RECORD
AND
BRIEF

No. 15-1293

In the
Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,
Petitioner,

v.

SIMON SHIAO TAM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), provides that the government shall not refuse a trademark registration on account of the mark's nature unless the mark "consists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." The question presented is whether the disparagement clause of the Lanham Act is facially invalid under the First Amendment.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a public interest legal foundation established in 1973 to litigate cases that advance the principles of limited government and economic liberty. Toward those ends, PLF has participated as amicus in many cases involving the speech rights of entrepreneurs and businesses. PLF attorneys have also published extensively on the need for full First Amendment protection for commercial speech. This case is important to PLF because it threatens the freedom of speech of individual entrepreneurs and commercial enterprises.

INTRODUCTION AND SUMMARY OF ARGUMENT

Simon Tam, an Asian-American, chose The Slants as a band name and recruited other Asian-Americans to join the band in order to provide an interesting and entertaining platform for discussion of discrimination against Asian-Americans. Resp. Cert. Br. 1-2. When Mr. Tam attempted to register The Slants as a trademark, however, the mark was refused as disparaging toward people of Asian descent. Resp. Cert. Br. 4. Mr. Tam appealed. Resp. Cert. Br. 4-5.

After a panel of the Federal Circuit affirmed, *In re Tam*, 785 F.3d 567, 571 (Fed. Cir. 2015), the full court sitting en banc reversed. *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2015) (en banc). It held that the disparagement clause violates the First Amendment,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae funded its preparation or submission. Counsel for both parties filed letters of consent to the filing of amicus curiae briefs, and are on file with the Clerk.

because it is a viewpoint- and content-based speech restriction. *Id.* at 1335. This Court granted review. *Lee v. Tam*, 137 S. Ct. 30 (2016).

Petitioners (government) primarily argue that the disparagement clause does not restrict speech. Pet. Br. 25-28. According to the government, the disparagement clause is merely a component of the government's system for registering trademarks. Pet. Br. 14-19. Alternatively, the government claims that if speech is restricted, it is only government speech or commercial speech, and thus unworthy of full First Amendment protection. Pet. Br. 37-48.

Mr. Tam's mark is not commercial speech, and the disparagement clause should be subject to strict scrutiny. Because the "commercial speech doctrine" only applies when the government regulates to protect the public from commercial harms or fraud, the doctrine is inapplicable here. This is not a case where the public is at risk from misleading advertising, nor is it a case where use of a trademark may potentially defraud the public. In fact, to the extent that The Slants is commercial speech, the government can best protect the public by granting the band trademark protection.

If the Court does hold Mr. Tam's mark to be commercial speech, an express overruling of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and the intermediate scrutiny for commercial speech it sets forth, is long overdue. There is no principled distinction between commercial and noncommercial speech in the First Amendment, and the Court should clarify that the Constitution fully protects commercial speech.

ARGUMENT

I

THE COMMERCIAL SPEECH DOCTRINE DOES NOT APPLY TO THIS CASE

The disparagement clause of the Lanham Act is a content- and viewpoint-based speech restriction. Nevertheless, the government relies on *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987), and *Central Hudson* to urge the Court to apply intermediate scrutiny under the "commercial speech doctrine" rather than the strict scrutiny required for viewpoint- and content-based speech restrictions. Pet. Br. 48. The Court should decline the government's invitation.

In 1976, this Court reinstated the protections of the First Amendment for commercial speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976). The Court later created a four-part test for evaluating commercial speech regulations in *Central Hudson*, 447 U.S. at 564, and modified the test in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996).

Commercial speech is best defined as speech that "does no more than propose a commercial transaction." *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762); *see also* Martin Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 74-75 (2007) (the definition of commercial speech for the Court is "speech advocating the sale of commercial products or services").

Trademarks on the other hand—and Mr. Tam's mark in particular—do not propose a commercial transaction. On the contrary, trademarks serve many functions, and Mr. Tam is using The Slants to express ideas that the First Amendment is designed to protect. *See* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 3:2 (4th ed. Westlaw); *see also* Resp. Cert. Br. 14, 28-30; *In re Tam*, 808 F.3d at 1328 ("With his band name, Mr. Tam conveys more about our society than many volumes of undisputedly protected speech.").

When expressive speech is "inextricably intertwined" with commercial components—like The Slants trademark—then the Court "cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). With The Slants, Mr. Tam and his fellow Asian-American band members have reappropriated a traditionally derogatory word, and turned it into a badge of pride. Resp. Cert. Br. 1-2. The band name cleverly expresses their views on discrimination against Asian-Americans. Because of its function and purpose, The Slants cannot be categorized solely as commercial speech under even the broadest definition. *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) ("[T]he Government should not be able to suppress . . . truthful speech merely because it happens to appear on the label of a product for sale.").

The rationale for affording commercial speech less protection does not apply to Mr. Tam's attempt to register The Slants. Government may restrict commercial speech to protect the public from "commercial harms," *Sorrell v. IMS Health Inc.*, 564

U.S. 552, 579 (2011) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)), or lessen the risk of fraud. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388-89 (1992) (citing *Virginia Bd. of Pharm.*, 425 U.S. at 771-72). Because neither concern is implicated here, the Court should not treat Mr. Tam's mark as commercial speech.

The Court's concern for protecting the public from "commercial harms" focuses on the financial loss suffered as a result of untruthful or misleading advertising. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 81-82 (1983) (Stevens, J., concurring). But trademarks—and registration with the government—remedy this problem on their own. As the government readily admits, trademarks protect the public from being confused or misled by competing merchants. *See* Pet. Br. 2 (citing, e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1299 (2015)). Indeed, to the extent there is concern about misleading or untruthful speech in this case, *granting* Mr. Tam registration of his trademark protects the public from confusion. Without such protection, other individuals could start a band called The Slants, and regardless of their intent, diminish the positive message expressed through Mr. Tam's use of the name.[2] Fans of Mr. Tam's band may mistakenly spend money to attend a show or purchase music from

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[2] This is not merely a hypothetical concern. One of the more recent examples of this problem involves the "One Direction" name used by a popular British musical group after a lesser known northern California group had already been performing under the name. Alanna Byrne, *One Direction Sued for $1 Million Over Name Dispute*, Inside Counsel (Apr. 11, 2012), http://www.insidecounsel.com/2012/04/11/one-direction-sued-for-1-million-over-name-dispute.

an impostor band. Were Mr. Tam granted registration of The Slants, however, he would possess powerful tools to prevent and end this confusion.

Likewise, the risk of fraud is not present with Mr. Tam's use of The Slants. Nowhere does the government contend that denial of Mr. Tam's mark is necessary to combat fraud. Even if it had, fraud is best mitigated by granting Mr. Tam trademark registration for The Slants. In any event, "the First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003). Government can use anti-fraud laws to prosecute, and thereby deter, speech that defrauds the public without tailoring its laws to pass scrutiny under the First Amendment. *See id.* at 621.

The government's reliance on *San Francisco Arts & Athletics* is unavailing. That case concerned the constitutionality of the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-96.[3] 483 U.S. at 524. The Amateur Sports Act granted the United States Olympic Committee "the right to prohibit certain commercial and promotional uses of the word 'Olympic' and various Olympic symbols." *Id.* at 526. The Court held that Congress intended the Amateur Sports Act to provide the Olympic Committee with additional protections beyond those available for trademarks under the Lanham Act. *See id.* at 530-31. In that context, the Court also held that "[t]o the extent that [the Amateur Sports Act] applies to uses 'for the purpose of trade [or] to induce the sale of any goods or services,' " then the commercial speech doctrine applies. *Id.* at 535.

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[3] The current version of the Act, the Ted Stevens Olympic and Amateur Sports Act, is codified at 36 U.S.C. §§ 220501-29.

Therefore, *San Francisco Arts & Athletics* does not hold that trademark regulation under the Lanham Act receives intermediate scrutiny as commercial speech. Instead, to the extent that the Court used a broader definition for commercial speech, it did so in relation to the Amateur Sports Act, not trademarks in general. Moreover, recent decisions of this Court have narrowed the applicability of the commercial speech doctrine. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring) ("[T]he Court has applied the heightened 'strict scrutiny' standard even in cases where the less stringent 'commercial speech' standard was appropriate.").

Rather than classify Mr. Tam's mark as commercial speech worthy of only limited constitutional protection, the Court should hold that The Slants is fully protected expressive speech. However, the government refused to register Mr. Tam's mark because it adopted the viewpoint that the mark's content (The Slants) is disparaging, Pet. Br. 4-5, and the disparagement clause requires the government to reject marks it finds disparaging. 15 U.S.C. § 1052(a).

Yet, the First Amendment prohibits "governmental control over the content of messages expressed by private individuals." *Turner Broadcasting Sys. v. Fed. Comm. Comm'n*, 512 U.S. 622, 641 (1994). This Court applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642. Likewise, when the government targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector and Visitors of*

the Univ. of Va., 515 U.S. 819, 829 (1995). Thus, "[v]iewpoint discrimination is [ ] an egregious form of content discrimination." *Id.* Here, because the government refused to register The Slants on content- and viewpoint-based grounds, the disparagement clause should be subject to strict scrutiny.

II

CENTRAL HUDSON SHOULD BE OVERRULED AND THE COMMERCIAL SPEECH DOCTRINE REPUDIATED

Even if this Court were to find Mr. Tam's mark to be commercial speech, the intermediate scrutiny described in *Central Hudson*, 447 U.S. at 564, should be repudiated.

A. *Central Hudson* Is Unworkable and Lacks Constitutional Principles

Since *Central Hudson* was decided in 1980, confusion and inconsistency have been the only guarantees in cases analyzing commercial speech regulations. *See 44 Liquormart*, 517 U.S. at 526-28 (Thomas, J. concurring); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 779-89 (1999) (discussing the inconsistent approach taken by courts and the calling into doubt of *Central Hudson* and the commercial speech doctrine); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1216-17 (2004) (noting that courts have acknowledged that the commercial speech doctrine is difficult to apply predictably). In all likelihood, confusion has resulted because there is no "philosophical or historical basis for asserting that

'commercial speech' is of 'lower value' than 'noncommercial' speech." *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring) (citing authorities); *see also generally* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990) (concluding that there is no valid reason for distinguishing between commercial and noncommercial speech); La Fetra, *supra* at 1221 ("excluding corporate speech from the First Amendment's reach would almost inevitably have a detrimental impact on the most fundamental values underlying the protection of free speech.").

Indeed, it is increasingly the case that distinguishing between commercial and noncommercial speech is a fool's errand. *Kasky v. Nike, Inc.*, 45 P.3d 243, 269 (Cal. 2002) *dismissed as improvidently granted*, 539 U.S. 654 (U.S. June 26, 2003) (Brown, J., dissenting) ("the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries."). The line between commercial speech and fully protected speech has long been blurred, but advances in technology and social connectedness further cloud the distinction. *See* La Fetra, *supra*, 1231-36. Examples ranging from music videos, to press releases, to television show product placement, to letters to the editor, to "guerilla" marketing and virtual advertising show that it is quite difficult to distinguish whether speech "does no more than propose a commercial transaction," or expresses views on the issues of the day, or engages in artistic expression. *Id.* at 1231-34. Another modern example

is the common practice of airlines engaging on the Twitter social media platform.[4]

In two recent First Amendment decisions, the Court declined to distinguish between commercial and noncommercial speech. In *Sorrell*, the Court struck down a Vermont statute that imposed a content- and viewpoint-based ban on commercial speech. 564 U.S. at 563-65, 580. The Court declined to determine which level of scrutiny was appropriate, because the Vermont statute could not withstand intermediate scrutiny. *Id.* at 571. However, the Court did reaffirm the significant value of commercial speech, and explained that its focus was the challenged law's content- and viewpoint-based application. *Id.* at 566-67. Furthermore, the Court limited the availability of intermediate scrutiny to circumstances where the government's interest is to prevent commercial harm and fraud. *Id.* at 579. To the extent that the commercial speech doctrine remains after *Sorrell*, it is limited.

More recently, in *Reed*, this Court held that content- and viewpoint-based speech restrictions are subject to strict scrutiny. 135 S. Ct. at 2226-27. The Court did not limit the rule to noncommercial speech, and cited approvingly to commercial speech decisions to set out the rule. *See id.* at 2226-28 (citing *Sorrell* and *Cincinnati*, 507 U.S. 410). Indeed, the Court cited *Sorrell* as authority for the proposition that before considering the purpose or justification for a speech

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[4] United Airlines, for example, uses its @united account to engage with customers, announce airline news, provide customer support, and generally promote itself. Aside from the occasional announcement of a fare sale, however, none of these communications neatly fit the definition for commercial speech.

restriction, the Court must first consider whether the law regulates based on content. *Id.* at 2228. There is no obvious reason to limit that proposition to noncommercial speech. In fact, were a court to consider whether a speech restriction applies to commercial or noncommercial speech first, it would violate *Reed*.

To be sure, *Reed* does not expressly hold that it applies to commercial speech. Yet, *Reed* set out broadly applicable rules for content-based speech restrictions, and did not seek to limit *Sorrell* or its application to commercial speech. Taking *Reed* at face value, some lower courts have begun applying it to content-based commercial speech restrictions. *See Thomas v. Schroer*, 127 F. Supp. 3d 864, 873-75 (W.D. Tenn. 2015) (applying strict scrutiny under *Reed* after determining Tennessee's Billboard Act was content-based); *but see Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 968-69 (N.D. Cal. 2015) (holding *Reed* does not apply to commercial speech). This Court should quell any remaining confusion by expressly overruling *Central Hudson*.

B. Principles of *Stare Decisis* Do Not Support Preserving *Central Hudson*

Respect for precedent and *stare decisis* are insufficient reasons to maintain *Central Hudson*. While *stare decisis* is "of fundamental importance to the rule of law," *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' " *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). It is appropriate

to overrule previous decisions when they are detrimental to "coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision." *Patterson*, 491 U.S. at 173. Once a previous decision has shown to be unworkable, "the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great" to justify upholding the decision. *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965); *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

Whether it is the confusing and inconsistent application of the four-part test for commercial speech, or the increasing difficulty in distinguishing between commercial and noncommercial speech, many have noted that *Central Hudson* is unworkable. *See, e.g.*, *44 Liquormart*, 517 U.S. at 526-27 (Thomas, J., concurring); *Kasky*, 45 P.3d at 269 (Brown, J., dissenting). Furthermore, the reasoning behind *Central Hudson*'s diminished protection of commercial speech has never been satisfactorily established. *44 Liquormart*, at 526 (Thomas, J., concurring). When a precedent's "logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 382 (2010). Therefore, considerations of *stare decisis* should not compel the Court to maintain a distinction between commercial and noncommercial speech founded on such questionable footing.

At a minimum, if *Central Hudson* remains good law, the Court should clarify that it only applies where

the government's interest is to prevent actual commercial harm or fraud. A better approach, more consistent with this Court's First Amendment precedents—including *Reed*—would explain that there is no principled distinction between commercial and noncommercial speech under the First Amendment. As a result, the Court should overrule *Central Hudson* and eliminate its unprincipled and limited protection of commercial speech.

III

CONCERNS ABOUT APPLYING STRICT SCRUTINY TO COMMERCIAL SPEECH RESTRICTIONS ARE EXAGGERATED

Anti-speech advocates suggest that subjecting commercial speech regulations to strict scrutiny could hamstring the government's ability to effectively regulate the economy and put consumers at risk. *See* Br. of Amicus Curiae Public Citizen, Inc., 18-21. But as discussed above, there is no good reason for distinguishing between commercial and noncommercial speech—assuming such a distinction is possible. Furthermore, fear that the government may need to scale back its role as regulator is not a persuasive argument for maintaining precedents lacking textual or principled support. Indeed, deciding between protecting speech or allowing government greater rein to restrict speech is a choice "that the First Amendment makes for us." *See Va. State Bd. of Pharmacy*, 425 U.S. at 770.

The government will still be able to protect consumers from fraud and commercial harms in a world where restrictions on commercial speech are subject to strict scrutiny. Kozinski & Banner, at 651-

52 (using anti-fraud statutes, libel laws, and securities regulations as examples that not much would need to change were commercial speech fully protected under the First Amendment). The government also has existing analyses for content-neutral regulations and mandated disclosures available to operate under without the need to satisfy strict scrutiny. Kozinski & Banner, at 651-52 (under content-neutral analysis, anti-fraud statutes and securities regulations would likely survive largely unchanged).

Protecting speech from government overreach is not a zero-sum game. *See* Kozinski & Banner, at 648 (rejecting the notion that fully protecting commercial speech will result in a "leveling process" that may weaken protection for noncommercial speech); *accord* Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991).[5] Concern that courts may improperly apply strict scrutiny or water down its strength is not a valid reason to avoid applying it to commercial speech restrictions. Instead, the Court should apply strict scrutiny to content- and viewpoint-based speech restrictions, and correct any misapplications of that standard. Failing to fully protect commercial speech does not ensure full protection for noncommercial speech, but it undoubtedly gives less protection to commercial speech. The only principled way to protect speech is to protect speech. *See United States v. Alvarez*, 132 S. Ct. 2537, 2563 (2012) (Alito, J., dissenting) (noting that the Court has found it necessary to protect false statements of fact in order to prevent chilling fully protected speech).

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[5] https://object.cato.org/sites/cato.org/files/pubs/pdf/pa161.pdf

CONCLUSION

For the foregoing reasons, the decision of the Federal Circuit should be affirmed. Strict scrutiny is the appropriate standard to review the disparagement clause, and if this Court holds Mr. Tam's mark to be commercial speech, *Central Hudson* should be repudiated.

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Respectfully submitted,

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